

Subjects, Objects, and Social Things: The Case of the Copyright Work

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My goal is to explore the meanings and functions of the subjects and objects of intellectual property: the work of authorship (or copyright work) in copyright, the invention in patent, and the mark and the sign in trademark. This paper takes up the example of the copyright work. It is usually argued that the central challenge in understanding the work is to develop a sensible method for defining or at least appreciating its boundaries. Those boundaries, conventionally understood as the metaphorical "metes and bounds" of the work, might be established by deferring to the intention of the author, or by searching for authorship (creativity or originality) or both. Or, those boundaries might be located by identifying authorship via reference to reader, viewer, or listener experience. Other avenues are available. In some respect, "what is the work?" or "what is this work?" might be answered definitively, and the answers might guide authoritative doctrinal and policy solutions. I argue that this premise and line of reasoning are mistaken. I argue that the idea of the work, and processes of interpreting it both as concept (type) and thing (token), play central roles in constructing the social character of expressive culture itself. Boundary-making and boundary-identification with respect to the work are processes of community and group formation and governance. In that sense they both confirm specific communities and groups and document overlaps and negotiations among multiple groups. A perfectly specified, bounded copyright(ed) work is a mirage. Works are neither strict subjects nor strict objects. They are boundaries themselves. Works, like patents, marks, designs, and related legal constructs, are "social things," which are necessary to the law, necessary to social life, and necessarily messy and imprecise.

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